No. 02-281

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

INYO COUNTY, CALIFORNIA, *et al.*,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN GAMING ASSOCIATION, AND INDIVIDUAL TRIBES IN SUPPORT OF RESPONDENTS

(full listing of *Amici Curiae* inside)

IAN HEATH GERSHENGORN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

RIYAZ A. KANJI
Counsel of Record
KANJI & KATZEN, PLLC
201 South Main Street, Suite 1000
Ann Arbor, MI 48104
(734) 769-5400

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Ave., N.W.
Washington, DC 20036
(202) 466-7767

KAIGHN SMITH, JR.
DRUMMOND WOODSUM & MACMAHON
245 Commercial Street
Portland, ME 04104
(207) 772-1941

Counsel for Amici Curiae

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LIST OF *AMICI CURIAE* TRIBES

Confederated Tribes of the Warm Springs Reservation
Eastern Band of Cherokee Indians
Grand Portage Band of Chippewa Indians
Grand Traverse Band of Ottawa and Chippewa Indians
Jamestown S'Klallam Tribe
Little River Band of Ottawa Indians
Little Traverse Bay Bands of Odawa Indians
Mashantucket Pequot Tribal Nation
Muckleshoot Indian Tribe
Pechanga Band of Luiseno Mission Indians
Pueblo of San Ildefonso
Pueblo of San Juan
Pueblo of Santa Clara
Salt River Pima-Maricopa Indian Community
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INTEREST OF *AMICI CURIAE*

Amici Curiae are two leading national Indian organizations and individual Tribes from throughout Indian country, all of which have a strong interest in the outcome of this case.[1] *Amici* share a firm commitment to effective law enforcement in Indian country, believing that maintenance of law and order is a fundamental responsibility of tribal governments and is essential to ensuring the welfare of tribal members. *Amici* also share a firm commitment to the view that tribal governments must be free to exercise their sovereign power, without undue state interference, to preserve the political integrity and core dignity of Tribes and to ensure the success of the federal policy of tribal self-determination. Finally, *Amici* share the unshakeable view that, far from being contradictory, these two commitments complement one another, such that effective law enforcement in Indian country does not depend upon the drastic revision to the doctrines of tribal immunity and tribal self-government sought by Petitioners.

Amicus National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. Dedicated to protecting the rights and improving the welfare of American Indians, NCAI has worked closely with state governments and organizations such as the National Conference of State Legislatures to develop productive models of state-tribal cooperation. The unilateral approach

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[1] No one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of the brief, and letters of consent have been filed with the Clerk.

to law enforcement suggested by Petitioners in this case is diametrically opposed to those models.

Amicus National Indian Gaming Association ("NIGA") is a non-profit organization with 168 member Tribes. NIGA endeavors to assist Tribes in their efforts to build and maintain strong and self-sufficient tribal governments.

The individual *amici* Tribes represent a cross-section of Tribes from around the country. Great variations exist among them, including with respect to their land and economic bases, populations, and histories. Like the other Tribes represented by NCAI and NIGA, however, they share a sense of outrage at the actions taken by Inyo County that gave rise to this case. They share an even deeper sense of outrage at the lead argument in Petitioners' brief – grounded as it is in stereotype – that if this Court does not authorize States and their subdivisions to take such actions, tribal reservations will become enclaves of lawlessness. Tribes and their members are firmly committed to fighting crime and its consequences and, to that end, work hand in hand with federal, state, and local law enforcement in an atmosphere of mutual respect. *Amici* are thus well placed to respond to Petitioners' suggestion that law enforcement imperatives justify the severe intrusion on both tribal immunity and the right of self-government that Petitioners ask this Court to ratify.

INTRODUCTION AND SUMMARY OF ARGUMENT

Raising the specter of "lawlessness" in Indian country, Petitioners come before this Court seeking the right to assert judicial authority against Tribes in order to search and seize tribal property. At issue are not just tribal personnel records, themselves documents of considerable importance to Tribes, but access to all manner of tribal property, including tribal

council minutes discussing critical governmental issues, records relating to sensitive matters such as cultural resource protection and negotiations with state or county counterparts, and historical items of great value to Tribes. Petitioners' argument thus extends to the very material of tribal government.

As demonstrated by Respondents' Brief, the Brief of the United States, and the Brief of the United South and Eastern Tribes ("USET"), time-honored doctrines of tribal sovereign immunity and tribal self-government foreclose the authority the County seeks. This case implicates the core of those doctrines.

The ability of Tribes to maintain the integrity and order of tribal property in accordance with the needs of their communities – an essential attribute of their sovereign authority, *see, e.g.*, *United States v. Mazurie*, 419 U.S. 544, 557-58 (1975) – requires that they retain control over outsiders' access to their records and other effects. For example, the decision whether and how to disclose government records requires difficult policy judgments that a sovereign must be able to make for itself. *See, e.g.*, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) (noting the "necessit[y] of centralizing determination" regarding disclosure of government records and the "possibilities of harm from unrestricted disclosure").

Petitioners' arguments would arrogate control of these decisions to local authorities, whose calculations may sometimes be "based on considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983). Such a transfer of authority would pose a clear affront to the core dignitary interests of the Tribes, interfering with the right of self-government, and threatening to reduce Tribes to "little more than private,

voluntary organizations." *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976).

This case similarly implicates the core of the tribal sovereign immunity doctrine. For though the Court has sometimes questioned the value of that doctrine (while nevertheless declining to rewrite it) when it appears to extend beyond "what is necessary to safeguard tribal self-governance," *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998), here it is invoked for that very purpose.

Petitioners' principal argument for rewriting the doctrines of sovereign immunity and tribal self-government is their claim that if States and their subdivisions are not granted the right to unilaterally execute search warrants against Tribes, reservations will devolve into enclaves of lawlessness. This brief exposes the fallacy of that claim. In the first instance, Petitioners' argument ignores the fact that, even absent the search warrant power Petitioners seek, Tribes and their members are already subject to comprehensive federal, state, and tribal criminal jurisdiction and enforcement, such that the law enforcement interest in this case is very narrow. Moreover, Petitioners' argument even as to that circumscribed interest is premised on a caricature of Tribes and tribal governments, presenting them as unwitting pawns or even willing participants in the efforts of lawbreakers to evade arrest and prosecution. Petitioners thus ignore the hundreds of law enforcement partnerships – covering the entire range of law enforcement activity including investigation, search, arrest, extradition, and prosecution – that Tribes have formed with state and local governments. Pursuant to these partnerships, States, Counties, and Tribes work together, sharing authority, manpower, and resources, as they endeavor to ensure effective law enforcement in Indian country. Accordingly,

Petitioners' distorted description of Indian country law enforcement provides no reason to overturn settled doctrines of tribal immunity and the right to tribal self-government.[2]

ARGUMENT

I. Petitioners' Rote Invocation of the Needs of "State Law Enforcement" Presents No Justification for Overturning this Court's Settled Sovereign Immunity Jurisprudence or for Curtailing the Right to Tribal Self-Government.

As demonstrated in the Briefs of Respondents, the Brief of the United States, and the Brief of USET, Petitioners here seek a dramatic reworking of the doctrines of sovereign immunity and the right to tribal self-government. Petitioners argue principally that if States and their subdivisions are not granted the right to execute search warrants against Tribes, reservations will devolve into enclaves of lawlessness where "evidence and proceeds of off-reservation (as well as on-reservation) criminal enterprise may rest, immune from search by law enforcement officials." Pet. Br. at 21. According to Petitioners, as a result of the court of appeals' decision, reservations have been transformed into potential "sanctuaries" for the "D.C. area sniper," "serial murderer[s] or rapist[s]," "child molester[s]," and "drug dealer[s]." Pet. Br. at 23.

As this Brief demonstrates, there is no legal or factual foundation for Petitioners' argument. *First*, the gross

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[2] This brief will not address the second and third questions raised in the Petition. *Amici* firmly believe that, given Petitioners' failure to raise the issue below, the question whether Tribes are persons entitled to bring a claim under 42 U.S.C. § 1983 is not properly before this Court. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001).

exaggeration of Petitioners and their *amici* aside, the law enforcement issue presented by this case is highly circumscribed. As California's chief law enforcement officer has stated in a memorandum to all California District Attorneys, Sheriffs, and Chiefs of Police, the decision of the court of appeals in this case "is very narrow in application and should have only a limited impact on local law enforcement."[3] Tribes and their members are subject to a comprehensive web of federal, state and tribal criminal jurisdiction and enforcement. *Federal* law enforcement officers unquestionably have authority to make arrests and to conduct searches of tribal property in the course of exercising their expansive criminal jurisdiction. Moreover, certain questions relating to searches and seizures by state and local officers of the property of *individual* Indians were addressed by this Court in *Hicks* and are not presented in this case.[4] The only issue here is the ability of States and their subdivisions – and not the federal government – to coerce access to documents and other property of *tribal governments* themselves. The fate of effective law enforcement in this country does not turn on that question.

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[3] Memorandum from Bill Lockyer, Attorney General, State of California, to All California District Attorneys, Sheriffs, and Chiefs of Police, at 2a (Apr. 16, 2002) (Appendix A).

[4] *Hicks* has engendered a vigorous debate, even as between the States themselves, as to whether it suggests that States have the inherent authority to issue process against tribal members in Indian country without any form of tribal consent, or whether tribal participation, such as was present in *Hicks*, is necessary. *Compare* Appendix A (California Attorney General reading *Hicks*' description of state authority broadly) *with* Appendix B (Memorandum from Patrick Irvine, Solicitor General of Arizona to all Division and Section Chief Counsels (May 9, 2002)) (cautioning that *Hicks* should be narrowly read). Although *Amici* firmly believe that the narrower reading of *Hicks* is appropriate, that issue is not presented for resolution in this case.

Second, and relatedly, Petitioners' argument is premised on the stereotypical and entirely unsupported premise that, absent the specter of state coercion, Tribes will willingly harbor criminals and conceal criminal evidence. In reality, Tribes around the country, in the exercise of their sovereignty, have voluntarily forged hundreds of effective law enforcement partnerships with their neighboring jurisdictions. Pursuant to these partnerships, States, Counties, and Tribes readily share not only evidence of criminal activity, but also authority, manpower, and resources as they work together to combat crime. Existing law enforcement practice, in other words, centers on cooperation, not coercion, and it has yet to produce hundreds of enclaves of lawlessness.

It is no doubt for these reasons that the United States, which has a clear and overriding interest in Indian country law enforcement as well as comprehensive enforcement powers there, has squarely endorsed the Tribes' position on this issue, *see* U.S. Br. at 14-28, and that States whose borders contain a significant portion of Indian country have taken the extraordinary step of also filing a brief in support of the Tribes.

A. The Law Enforcement Issues Presented By This Case Are Very Narrow.

Petitioners' claims ignore entirely the expansive (albeit complex) web of federal, state and local, and tribal criminal jurisdiction and enforcement authority that applies in Indian country.[5]

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[5] Indian country is defined at 18 U.S.C. § 1151, and includes, *inter alia*, all land within reservations whether or not owned by Indians, *id.*, and tribal trust lands, *see Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991).

1. Entirely absent from Petitioners' Brief is any acknowledgement of the critical role played by federal law enforcement in Indian country. Congress has broad authority over Indian country and has enacted numerous criminal statutes that pertain to it. General federal criminal legislation, for example, applies to both Indians and non-Indians in Indian country. Hence, federal criminal statutes such as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), firearms statutes, narcotics statutes, and the mail and wire fraud statutes restrict conduct in Indian country as elsewhere.[6]

Congress has supplemented these nationwide federal criminal statutes with several specific to Indian country. The Major Crimes Act, 18 U.S.C. § 1153, for example, provides federal jurisdiction over certain major felonies committed by Indians in Indian country, including murder, rape, kidnapping, assault, arson, robbery, and theft, regardless of the identity of the victim. *See id.*

The Indian Country Crimes Act ("ICCA"), 18 U.S.C. § 1152, another critical source of criminal prohibitions, imports into Indian country the federal criminal law applicable to places "within the sole and exclusive jurisdiction of the United States," *id.*, except for crimes in which both the perpetrator and the victim are Indians. The ICCA incorporates the Assimilative Crimes Act, 18 U.S.C. § 13, which in turn generally incorporates state criminal law and applies it as a matter of federal law to federal enclaves. *See generally Lewis v. United States*, 523 U.S. 155, 159-61 (1998). The ICCA thus extends to Indian country state

[6] *See, e.g., United States v. Juvenile Male*, 118 F.3d 1344, 1350-51 (9th Cir. 1997) (RICO); *United States v. Yankton*, 168 F.3d 1096, 1097-98 (8th Cir. 1999) (firearms statutes); *United States v. Blue*, 722 F.2d 383, 384 (8th Cir. 1983) (federal drug laws); *United States v. Boots*, 80 F.3d 580, 593 (1st Cir. 1996) (federal wire fraud statutes).

substantive criminal law, which is incorporated into federal law and enforced by federal authorities. *See Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993).

Critically, and also ignored by Petitioners, all of these federal statutes are enforced by federal authorities with unquestioned jurisdiction over Indian country. The Federal Bureau of Investigation ("FBI") and the Bureau of Alcohol, Tobacco and Firearms, for example, have authority in Indian country to enforce federal laws, including the ability to make arrests throughout Indian country and to execute search warrants, even against tribal property. Accordingly, Petitioners' purported concern that the D.C. area sniper, narcotics traffickers, organized crime figures, or other federal lawbreakers could somehow seek sanctuary on reservations for their off-reservation crime is frivolous. Moreover, 18 U.S.C. § 1073 makes it a federal crime to travel interstate with the intent to avoid prosecution for any crime which is a felony in the jurisdiction from which the fugitive is fleeing. Thus, for example, any fugitive who sought refuge on a reservation after traveling interstate to avoid a state law prosecution would be subject to search and arrest by federal authorities throughout Indian country.

2. States, too, play an important law enforcement role with respect to Indians and Indian country, and will continue to do so regardless of the decision in this case. Outside Indian country, the State has criminal jurisdiction over all persons, Indians and non-Indians alike. *See, e.g., Hagen v. Utah*, 510 U.S. 399, 421-22 (1994). In addition, for more than a century it has been clear that States have jurisdiction even over crimes committed in Indian country, when the crimes are committed by non-Indians and are either against non-Indians, *see Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881), or are

victimless, *see Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984).

Congress has supplemented this general authority with specific grants of jurisdiction to particular States. For example, in 18 U.S.C. § 1162, commonly known as Public Law 280, Congress gave certain States, including California, extensive criminal jurisdiction over crimes committed within their Indian country. Several other States later assumed such jurisdiction under the statute to varying degrees. *See generally Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 471-72 & n.9 (1979) (describing operation of Public Law 280 and later amendments). The net result of this and similar federal statutes, *see* 439 U.S. at 471 n.8, is that a significant portion of Indian country is subject to state criminal jurisdiction.[7]

Contrary to Petitioners' contentions, in the decision below renders these statutes unenforceable. As the Brief for the United States correctly observes, "[t]he recognition of tribal immunity to state process does not prevent state officers from obtaining information in other ways." U.S. Br. at 26. For example, absent other prohibitions, States have the authority in the circumstances described in *Nevada v. Hicks* to seek to execute search warrants against individual tribal members. Moreover, in the substantial portion of

[7] The cooperative approach to Indian gaming embodied in the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, allows for further expansion of state criminal jurisdiction. Before class III (casino-style) gaming may be conducted on Indian lands, the relevant Tribe and State must attempt to negotiate a compact. Among the items Congress provided may be addressed in a state-tribal compact are "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; [and] the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." 25 U.S.C. § 2710(d)(3)(C).

Indian country subject to state criminal jurisdiction pursuant to Public Law 280 or its equivalent (including California), States have broad authority to make arrests on reservations for state law crimes, whether or not committed in Indian country. And, of course, the federal government has the power in non-Public Law 280 States to make arrests for on-reservation crime while enforcing state substantive criminal law as incorporated through the ICCA.

3. The elaborate system of federal and state criminal enforcement is reinforced by tribal criminal justice systems. Tribes retain general (and often concurrent) jurisdiction over offenses committed by Indians. As discussed in greater detail below, many Tribes now have significant police forces, and those forces work closely with federal and state authorities on criminal matters.

The net result of this comprehensive and overlapping scheme is a picture of law enforcement in Indian country that belies Petitioners' claims. The Attorney General of California was correct in stating that the opinion of the court below "is very narrow in application and should have only limited impact on local law enforcement." Appendix A at 2a.

B. Tribes, Acting as Sovereigns and Free of State Encroachment, Already Serve as Effective Partners in Criminal Law Enforcement.

Even with respect to the narrow law enforcement issue presented by this case, maintenance of a due regard for tribal sovereignty will not impede the effective enforcement of the criminal laws. The claims of Petitioners and their *amici* that adherence to the existing doctrines of immunity and self-government will lead to the establishment of hundreds of enclaves of lawlessness are based on caricature, and ignore a

fundamental reality: Tribes have every bit as much of an interest in eradicating crime, be it within Indian country or without, as do States and their subdivisions. To that end, and in the exercise of their sovereignty, Tribes have forged hundreds of effective law enforcement partnerships with neighboring jurisdictions. A decision respecting tribal self-government in this case will simply leave these partnerships intact.

1. Tribes Have Entered Into Numerous Cooperative Law Enforcement Agreements With States and Counties Around the Country.

A tremendous amount of cooperation in the law enforcement arena already takes place between Tribes and interested States and Counties throughout Indian country. Perhaps the most obvious manifestations of this cooperation are the scores of formal cooperative law enforcement agreements entered into between Tribes and their neighboring jurisdictions. *See Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (noting the "host of cooperative agreements between tribes and state authorities ... to provide law enforcement") (O'Connor, J., concurring); Douglas R. Nash & Christopher P. Graham, *'The Importance of Being Honest': Exploring the Need for Tribal Court Approval for Search Warrants Executed In Indian Country After* State v. Mathews, 38 Idaho L. Rev. 581, 593 (2002) (observing that "tribes and states have . . . negotiated numerous cooperative agreements in critical areas of law enforcement"); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922, 927 (1999). These agreements are grounded in the shared recognition of Tribes and numerous States and Counties that, by pooling their law enforcement resources and expertise,

they can forge effective alliances and realize mutual benefits across jurisdictional lines. *See, e.g.*, Tulalip Tribes and Snohomish County (Washington) Cooperative Law Enforcement Agreement at 3 ("Tulalip Tribes Agreement") ("the Tribes and the County each wish to facilitate a cooperative approach to law enforcement to enhance public safety for all persons and property within the Reservation").

Amicus NCAI maintains a partial repository of these agreements which, although far from complete, contains well over one hundred documents.[8] Although the agreements vary in their details, they contain a number of critical features.

First, they provide for the deputization of tribal police officers who meet certain minimum qualification and training requirements as state or county officers, allowing tribal police to enforce state criminal law within their Tribe's Indian country. *See, e.g.*, Agreement Between the New Mexico State Police and the Navajo Tribe at 3 ("[Navajo] Peace Officers commissioned pursuant to this Agreement shall have all the powers of New Mexico Peace Officers to enforce state laws..., including but not limited to the power to make arrests for violations of state laws."); Cooperative Law Enforcement Agreement Between the Leech Lake Band of Ojibwe Indians and the Counties of Beltrami, Cass, Hubbard, Itasca and the City of Cass Lake (Minnesota) at 1 ("Leech Lake Agreement"); Cooperative Agreement Providing for Cross-Deputization of Law Enforcement Officers of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the City of Wolf Point, the City of Poplar, the Montana Highway Patrol, and Roosevelt County at 4.

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[8] *See* http://www.ncai.org/main/pages/issues/governance/agreements/law_enforcement_agreements.asp. The law enforcement materials cited in this brief are available on the NCAI website.

Thus, far from treating Tribes as unworthy or unreliable partners in the task of law enforcement, many States and Counties have shared their criminal enforcement authority with Tribes to further crime control. Indeed, in recognition of the benefits of such arrangements, a number of States provide for the deputization of tribal officers by statute. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3874; *see also* N.M. Stat. Ann. § 29-1-11; 1987 N.C. Sess. Laws ch. 427; Nev. Rev. Stat. 171.1255 (2001).

Second, the agreements often provide for the deputization of state officers as tribal police officers so that the former can enforce tribal laws. *See, e.g.*, Cross-Deputization Agreement By and Between the Bureau of Indian Affairs, the Nebraska State Patrol, and the Winnebago Tribe of Nebraska at 1-2 (authorizing the deputization of Nebraska police officers "to enforce Federal, State and Winnebago Tribal Laws within the exterior boundaries of the Winnebago Indian Reservation vis-à-vis Indians" with Winnebago officers likewise deputized to enforce state law); Cooperative Law Enforcement Agreement Between and Among the Bureau of Indian Affairs, Three Affiliated Tribes, and County of Montrail (North Dakota) at 2-3; A Law Enforcement Agreement Between and Among the Cherokee Nation, the United States of America, the State of Oklahoma and its Political Subdivisions, the Various Boards of County Commissioners, and Various Law Enforcement Agencies at 3. These provisions reflect a recognition by the parties involved that tribal criminal laws form an important part of the law enforcement arsenal, such that their reach should be extended to the greatest extent possible.

Third, the agreements frequently address the execution of search and arrest warrants within Indian country, and reflect a variety of cooperative approaches to these subjects. Some agreements provide that to execute a search warrant within

the boundaries of a reservation, a State or County should first have its warrant converted into a tribal court warrant, with either tribal or non-tribal police officers, or a combination of both, executing the warrant. *See, e.g.*, Interlocal Agreement for Deputization and Mutual Law Enforcement Assistance Between the Little Traverse Bay Bands of Odawa Indians and the County of Emmet (Michigan) at 3-5 ("County law enforcement officers must present search warrants authorizing the search for evidence located on Trust lands to the State Court and Tribal Court for enforcement, and for execution by Tribal law enforcement authorities. The [Little Traverse] Prosecuting Attorney agrees to review and prepare search warrants for Trust lands."). Others provide that tribal police will serve state warrants for their partner jurisdictions. *See, e.g.*, Deputization Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the Sheriff of Leelanau County (Michigan) at 4 ("Grand Traverse Agreement") ("County law enforcement officers shall present search warrants authorizing the search for evidence located on the Tribe's reservation and Indian country . . . to Tribal law enforcement authorities for execution."); Cooperative Agreement Regarding Law Enforcement Between the Fond du Lac Band of Lake Superior Chippewa and St. Louis County (Minnesota) at 3-4.

With respect to arrest warrants, the agreements typically provide that tribal police will participate in making arrests for their neighboring jurisdictions based on either state or tribal process. *See, e.g.*, Interlocal Cooperation Agreement for Mutual Aid Between City of Burlington, Washington, and Swinomish Indian Tribal Community at 3 ("The City and Tribe agree to cooperate in the execution of warrants properly issued at the request of the other party and to allow duly authorized enforcement officers of the requesting jurisdiction, and officers of the jurisdiction whose law is

applicable, to participate in serving the warrant, upon request"); Law Enforcement Agreement Among the Eastern Shoshone And Northern Arapaho Tribes, Hot Springs County (Wyoming), and the Bureau of Indian Affairs at 6; Agreement By and Between the Confederated Tribes of the Umatilla Indian Reservation and the State of Oregon Regarding Fresh Pursuit and Extradition at 2.

Fourth, and squarely in keeping with this collaborative approach, the parties to these agreements often pledge substantial help to each other in carrying out their investigatory activities. *See, e.g.*, Cross-Deputization Agreement Among the City of Bennington, Oklahoma, the Bureau of Indian Affairs, and the Choctaw Nation of Oklahoma at 3-4 ("all parties to this Agreement shall cooperate with each other to provide comprehensive and thorough law enforcement protection, including but not limited to . . . performing investigations."); Leech Lake Agreement at 4 ("In exercising authority under this agreement, Band Law Enforcement Officers shall prepare investigative reports in accordance with the County's or City Procedures, and at the request of the Sheriff, County or City Attorney, shall perform any additional or supplemental investigation, including interviewing of necessary witnesses or the execution of any necessary process including search warrants."); Memorandum of Understanding Concerning Investigation and Prosecution of Violations of the State of New Mexico Gaming Laws on Acoma Pueblo Lands by the District Attorney for the Thirteenth Judicial District at 4-7; Tulalip Tribes Agreement at 11 and Attachment A.

While the sharing of documents and other materials is generally subsumed in such pledges, the parties to these agreements often make their willingness to exchange investigative materials explicit. *See, e.g.*, Joint Powers Agreement Between the Hoopa Valley Tribe and the County

of Humboldt (California) at 3-4 ("The Hoopa Valley Tribal Police shall conform to Humboldt County deputy sheriffs' deadlines respecting timely submission of investigation, arrest and other reports); Leech Lake Agreement at 4; Cross-Commission Agreement Between the Navajo Nation and the McKinley County (New Mexico) Sheriff's Office at 6.

Through their cooperative agreements, then, Tribes, States, and Counties pledge to work together extensively on matters of criminal law enforcement. They share authority, manpower, information and other resources in their common fight against crime. And they evidence their belief that, contrary to the claims of Petitioners and their supporting *amici*, effective law enforcement in Indian country can take place in an atmosphere of mutual respect and collaboration. "Practice has found that the relationship that arises from the joint training, deputization, and working of tribal and nontribal police officers under a cross-deputization program can enhance the effectiveness of enforcement." Conference of Western Attorneys General, *American Indian Law Deskbook* 413 (2d ed. 1998).[9]

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[9] Although Petitioners entirely ignore the relevance of cooperative agreements, this Court has previously recognized that voluntary arrangements are the preferred way – and at times the only way – to accommodate the interests of both the States and the Tribes. In *Potawatomi Indian Tribe*, 498 U.S. at 514, for example, the Court held that, although a state could require Indian retailers to collect state-imposed taxes on certain sales to non-members, tribal sovereign immunity precluded States from suing Tribes to collect the taxes. The Court noted that the States had alternative mechanisms available to them, including the ability to "enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." *Id.*

At least partly in response to this Court's suggestion in *Potawatomi Indian Tribe*, and evidencing an ever-strengthening commitment on the part of States and Tribes to address issues of mutual concern through cooperation, hundreds of state-tribal agreements, covering a broad range of topics, have been negotiated during the past decade. *See generally*

2. Tribes Have Promulgated Extradition Codes and Court Rules That Further Evidence the Tribes' Commitment to Effective Law Enforcement.

Nor are formal agreements the only cooperative mechanisms for ensuring effective law enforcement. Numerous Tribes, for example, have well-developed extradition codes.[10] That of the Sisseton-Wahpeton Sioux Tribes in North Dakota is illustrative. It provides, unambiguously, that "[i]t is the duty of the Tribal Chairman...to have arrested and delivered up to the demanding Executive Authority of any other jurisdiction any fugitive from justice that has committed an offense in another jurisdiction." Sisseton-Wahpeton Sioux Tribal Ordinance, Ch. 30-02-01. The requesting jurisdiction must simply attest that the subject of its request committed an offense within its borders and subsequently fled. While the fugitive is then entitled to a hearing, the Code plainly states, in language replicated in numerous other Tribal extradition provisions, that "[t]he guilt or innocence of the accused of

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David H. Getches, *et al.*, Federal Indian Law at 619-20 (4th ed. 1998). These agreements often address, in a very detailed and sophisticated manner, issues of enforcement and information-sharing. *See, e.g.*, Tax Agreement Between Bay Mills Indian Community and the State of Michigan at 33-49; Cooperative Agreement Between the New Mexico Environmental Department and the Pueblo of Laguna at 4-7.

[10] *See, e.g.*, Poarch Band of Creek Indians Code, sec. 9-2; Nez Perce Tribal Code, Ch. 2-1, R. 20; Confederated Tribes of the Umatilla Indian Reservation Extradition Code; Fort McDowell Yavapai Community Law and Order Code, Ch. 7; White Mountain Apache Tribe, Criminal Code, Ch. 3; Salt River Pima-Maricopa Indian Community Tribal Code, Ch. 7; Ute Indian Tribe of the Uintah and Ouray Reservation Law and Order Code, Title XII, R. 33.

the crime charged may not be inquired into by the Chairman or by the Tribal Judge in any proceeding after the demand for extradition is submitted, other than to the identification of the accused." *Id.* Ch. 30-10-01. Such provisions are common in Indian country.[11]

Tribal and state courts have also agreed, by way of rule or decision, to honor each other's judicial acts, including warrants. In Michigan, for example, the state courts and many tribal courts have adopted a companion rule providing that they will treat one another's "judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts" as presumptively valid. Mich. Ct. R. 2.615; Grand Traverse Band Ct. R. 10.001-10.107; Bay Mills Indian Community Ct. R. 1.101-1.301; Hannahville Indian Community, Ct. R. 1.000-1.300; Little River Band of Ottawa Indians Regs. 1.100-1.103; Little Traverse Bay Bands of Odawa Indians, Ct. R. 4.000-4.400; *see also* Hon. Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. Det. Mercy L. Rev. 709 (1999) (article by Michigan Supreme Court Justice explaining history of the rules and other ways in which Michigan state and tribal courts cooperate). Other jurisdictions have similar rules in

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[11] In *Hicks*, this Court cited the Ninth Circuit's decision in *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), as the only support for the proposition that, if state process cannot run against individual Indians on reservations, those reservations might become asylums for fugitives. *Hicks*, 533 U.S. at 364 n.6. *Turtle* addressed a situation "in which the Navajo Tribal Court refused to extradite a member to Oklahoma because tribal law forbade extradition except to three neighboring States." *Id.* However, the *Turtle* case was decided almost 34 years ago. The very year after the decision, in 1970, the Navajo Nation amended its extradition code to remove the offending geographical limitations, in order that "Navajo land not become an asylum for criminals." Resolution of the Navajo Tribal Council re Extradition (May 14, 1970). Other tribal extradition codes are likewise free of such limitations.

place. *See, e.g.*, N.C. Gen. Stat. § 1E-1 (according "full faith and credit" to judgments, decrees or orders of the Eastern Band of Cherokee Indians); Cherokee Code § 25-5 (companion rule of the Eastern Cherokees); N.D. Ct. R. 7.2; Ralph J. Erickstand & James Ganje, *Tribal and State Courts – A New Beginning*, 71 N.D. L. Rev. 569 (1995) (former North Dakota Supreme Court Justice explaining history of North Dakota Rule and initiatives taken by the Conference of Chief Justices to foster cooperation between state and tribal courts); Wash. Super. Ct. Crim. R. 82.5; *see also Husband v. Wife*, MPCA-2001-1065, slip op. at 13 n.6 (Mashantucket Pequot Ct. App. Jan. 24, 2003) ("[I]t is the Tribe's public policy to have a strong presumption of enforcement of Connecticut judgments in the Mashantucket courts whenever possible.").

3. A Tremendous Amount of Law Enforcement Cooperation Takes Place on the Ground Between Tribes and Their Neighboring Jurisdictions.

Taken together, the cooperative agreements, extradition ordinances, and court rules canvassed above – along with numerous less formal mechanisms for cooperation – lay the foundation for the extensive interaction that takes place in Indian country between state, county, and tribal law enforcement authorities. Across the nation, officers from neighboring tribal and non-tribal jurisdictions coordinate their activities and share information on a regular basis. They do so not as a result of the bullying that took place in this case, but rather voluntarily and out of respect for the value that their colleagues in law enforcement bring to the table.

Within the parameters of this brief it is impossible, of course, to document the full extent of the collaboration that

Tribes engage in with other jurisdictions. But *Amici* hope that a quick survey of the situation in three very different States will convey to the Court at least some of the flavor of that collaboration.

Arizona. "Law enforcement in Arizona has a proud history of cooperation and professionalism." Letter from Paul K. Charlton, United States Attorney for the District of Arizona to Tribal and Non-Tribal Members of the Law Enforcement Coordinating Committee for the District of Arizona (Feb. 11, 2002) (Appendix C at 9a). In the wake of this Court's decision in *Hicks*, the Solicitor General of Arizona expressed concern that a broad reading of the decision might lead to an erosion in that cooperation between tribal and non-tribal jurisdictions, and urged all state and local agencies to "continue to cooperate and coordinate law enforcement activities and investigations with the appropriate tribal law enforcement agency." Appendix B at 6a-7a. The United States Attorney expressed similar sentiments, noting that "[w]hile the impact and meaning of the *Nevada v. Hicks* decision is discussed, it is my hope that state, county and federal law enforcement agencies will continue to cooperate and coordinate law enforcement activities and investigations with the appropriate tribal law enforcement agency." Appendix C at 9a. The United States Attorney emphasized that "[t]o do otherwis[e] would create public safety concerns and reverse the high standards of professionalism each of our agencies have set." *Id.*

That both state and federal officials in Arizona have provided ringing endorsements of the value of cooperating with Tribes on law enforcement matters is not surprising. Like their counterparts elsewhere in the country, the twenty-two Arizona Tribes (who together and with their members occupy approximately 20 million acres of trust land, *see Tracy v. Superior Court*, 810 P.2d 1030, 1043 n.12 (Ariz.

1991)), have demonstrated a serious and abiding commitment to law enforcement, and have long engaged in joint and cooperative law enforcement mechanisms with the state and local governments to this end. The Tribes boast sizeable police departments: in 2000, for example, the Tohono O'odham Nation had 76 full-time sworn officers, the Gila River Indian Community had 58; the Salt River Pima-Maricopa Indian Community ("Salt River") had 51; the White Mountain Apache Tribe had 36; the Colorado Indian Tribes had 32; and the Navajo Nation, with a police department that dwarfs those of many counties and municipalities, had 321. Matthew J. Hickman, U.S. Dep't of Justice, Bureau of Justice Statistics, *Tribal Law Enforcement, 2000,* at 2, Table 4 (Jan. 2003). Those departments have earned commendations for their effective police work. *See* Salt River Letters of Commendation. Their police chiefs are active participants in the Arizona Peace Officers Standards and Training Board, and under Arizona law, as noted above, tribal police officers generally "possess and exercise all law enforcement powers of peace officers in this state." Ariz. Rev. Stat. § 13-3874.

Cooperation between the Tribes' law enforcement agencies and those of neighboring jurisdictions is a hallmark of their existence. At Salt River, for example, the police detectives are so highly proficient that the federal government no longer utilizes FBI agents to investigate federal crimes – Salt River detectives work up federal cases and send them directly to the United States Attorney's Office for prosecution. Those same detectives, along with Salt River police officers, exchange information on at least a weekly basis with their counterparts in neighboring jurisdictions, which include the City of Phoenix, the City of Scottsdale, the City of Tempe, the City of Mesa, Maricopa County, and the State. Tribal police officers regularly

domesticate and execute search warrants for other jurisdictions – the federal government itself has never seen a reason to execute its own search or arrest warrants on the reservation. *Cf.* U.S. Br. at 21 n.10 (noting that although the United States "may issue and execute process directed at state and tribal property," it "ordinarily does not find it necessary to resort to such process"). The Tribe also participates in a number of task forces with surrounding jurisdictions that are targeted towards specific crimes, including homicides, gang violence, and auto theft. And pursuant to its extradition ordinance, Salt River has extradited over 18 fugitives from justice within the last three years alone, with no extradition requests denied by the Tribal Court. *See* Salt River Extradition Log.

The story is much the same at other Arizona Tribes. The White Mountain Apache Tribe participates in a multi-jurisdictional task force that nicely illustrates the manner in which tribal and non-tribal authorities work together to reduce crime. Named the Fort Apache Safe Trails Task Force, it brings together the FBI, the Bureau of Indian Affairs, the White Mountain Apache Police Department, the Navajo County Sheriff's Department, the Arizona Department of Public Safety, and the Pinetop/Lakeside Police Department. *See* Memorandum of Understanding Involving White Mountain Apache Police Department and Federal, State, and Local Law Enforcement Agencies at 1. Each of the participating agencies contributes law enforcement officers to a joint investigative and enforcement body. *Id.* at 2. Those officers are then federally deputized, and work together as a team, freely sharing resources, information and evidence in investigations related to murder, rape, child abuse, narcotics trafficking, arson and other crimes. *Id.* at 2-5.

The Tohono O'odham Nation, meanwhile, not only has in place a cooperative law enforcement agreement with Maricopa County, but also engages in extensive efforts with federal and state authorities to stem the flow of illegal immigrants and narcotics coming across the Mexican border. *See* Tohono O'odham Nation Law Enforcement Materials. The Tribe assists in apprehending approximately 800 illegal immigrants and thousands of pounds of narcotics a month, spending $2.5-$3 million a year on border-related law enforcement issues alone. *Id.* In the past year, moreover, the Tribe, like other border Tribes, has worked closely with federal and state agencies on Homeland Security issues. *Id.*[12]

Michigan. The Michigan Tribes differ in significant respects from their Arizona counterparts. Perhaps most notably, they have far smaller land bases. However, they share a similar commitment to criminal law enforcement, and to working with their neighboring jurisdictions to this end.

Michigan Tribes have entered into a good number of cooperative law enforcement agreements, and some of their salient provisions are quoted above. In the main, those agreements provide for cross-deputization, the execution of state search and arrest warrants in Indian country by Tribal police (with domestication of the search warrants sometimes

[12] When Arizona joined the Union, it was required to acknowledge what was then understood about the relationship between States and Tribes: that the State had no right or title to Indian lands within the State, and that those lands were and would "remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." Ariz. Rev. Stat. Enabling Act, Sec. 20. As required, Arizona included this "disclaimer provision" in the new State's Constitution. Ariz. Const. art. XX, par. 4. Arizona is not a Public Law 280 State.

required), and cooperation on investigations. Michigan state and tribal courts have also, as previously discussed, promulgated Rules according presumptive validity to one another's judicial acts, including warrants. *See supra* p. 19.

These provisions have resulted in a great deal of cooperation on the ground. The Grand Traverse Band, for example, regularly provides governmental documents, surveillance tapes and other information to state and county officials in connection with their investigation and prosecution of crime. Hence, the Band supplied state prosecutors with its casino customer activity journal and other records in connection with the well-publicized prosecution of a non-Indian on racketeering charges in Antrim County (the defendant had attempted to launder some of his ill-gotten gains through the Band's casino), and authorized several employees to testify in the matter. *State v. Roote,* No. 02-0761-FY-3 (86th Dist. for the County of Antrim, Mich. 2002). The Leelanau County Sheriff has stated unequivocally that his "agency has an 'excellent' working relationship with [the] Tribal Police Department . . . [Tribal] officers have never hesitated to help out when requested and this benefits the entire county!'' Letter From Leelanau County Sheriff's Office to Grand Traverse Band (Sept. 1, 1998). That assistance extends to all manner of volatile and challenging situations. Leelanau County Sheriff's Office/Grand Traverse Band Police Dep't Mutual Assistance Summary.

This same extensive web of law enforcement cooperation is common elsewhere in Michigan. Little Traverse police officers, for example, regularly collaborate with their Emmett County counterparts on the execution of warrants and preserve evidence for them. *See, e.g.* Little Traverse Police Report #55-040-03 (Feb. 7, 2003). The same is true for the Little River Band of Ottawa Indians, which

responded to 158 requests for assistance from other jurisdictions in 2002. Little River Band of Ottawa Indians, Dep't of Public Safety Yearly Report at 1, 2002.

Washington. Washington State (with its 29 federally recognized Tribes) provides another important example of how Tribes and their neighboring jurisdictions cooperate on law enforcement matters, whether they have formal collaborative agreements in place or not. Although the Suquamish Indian Tribe has no written arrangement with its neighbors on law enforcement matters, its police department regularly transmits reports and evidence of criminal activity to its state and county counterparts. Suquamish Police Mail Log (recording 60 such transmittals in 2002). When state or county officers wish to search trust property, they ask the tribal court to issue a warrant, which tribal police then execute for them. *See, e.g.*, Order, *Washington v. A Gray and White Double Wide – 17631 Crummit Lane* (Suquamish Tribal Ct., Sept. 27, 2002).

The Swinomish Indian Community, meanwhile, has separate cooperative agreements in place with at least four of its neighbors: Skagit County, the City of Burlington, and the towns of LaConner and Coupeville. The net result is the same: a great deal of interaction and collaboration between the jurisdictions. The Swinomish Police Department frequently conveys police reports, witnesses statements, and evidence within its possession to federal, state and county authorities, *see* Swinomish Police Department Log Sheet (recording scores of transmittals); Skagit County Prosecutor's Request Form; Correspondence with Federal Aviation Administration. Its officers provide all manner of assistance to their counterparts in other departments, and regularly receive expressions of gratitude for doing so. *See* Commendation Letters to Swinomish Police Dep't from Town of La Conner Police Dep't, City of Chelan Police

Dep't, Skagit County Police Dep't, and the Federal Bureau of Investigation.

A similarly high level of cooperation exists at the Tulalip Tribes, which have a formal cooperative agreement in place with Snohomish County and collaborate informally with other neighbors. Search warrants, are domesticated by the tribal court and executed jointly by tribal and non-tribal officers. *Espitia v. Tulalip Tribes*, No. TUL-CR-10/02-476, Search Warrant (Tulalip Tribal Ct. filed Oct. 10, 2002) (search warrant and supporting materials). The Tribes frequently engage in joint investigations with state, county and city police forces regarding all manner of serious crime, with the collaboration yielding impressive results. *See id.* And the Tribes regularly share materials pertinent to law enforcement, including documents of the type at issue in this case. *See* Order, *In re Personnel Files of Dr. Melvin E. Chandler*, No. TUL-CR-12/96-693 (Tulalip Tribal Ct. Jan. 16, 1997) (releasing personnel records of a non-Indian doctor to state and county officials in connection with their investigation of potential criminal misconduct).

The situations in Arizona, Michigan and Washington are replicated throughout the country. Tribes, acting as sovereigns, and free of state coercion, regularly collaborate with their neighboring jurisdictions in a common fight against crime. Indeed, even in California, cooperation exists between Tribes and interested Counties. The Hoopa Valley Tribe and Humboldt County, for example, have in place a law enforcement agreement, quoted above, which calls for extensive cooperation on policing and investigatory matters. Pursuant to that agreement, tribal police officers work closely with their county counterparts, often putting their lives in great danger while doing so. *See, e.g.*, Humboldt County Drug Task Force and Hoopa Valley Tribal Police Department Investigative Reports.

All of this is not to say, of course, that Tribes do not from time to time make mistakes, or act in a manner that other jurisdictions may view as less than fully cooperative. Tribal governmental decisions, like state and county decisions, are made by human beings, and hence are subject to error or reasonable professional disagreements. As can be expected whenever sovereigns interact, there have been occasional (and sometimes well-publicized) stalemates. What is relevant, however, is how few of these incidents there have been, how even they have generally been resolved (sometimes with federal help), and how Tribes have overwhelmingly demonstrated a commitment to law enforcement cooperation.[13]

[13] Petitioners' claims of potential "lawlessness" appear even more far-fetched in the gaming context. IGRA gives the National Indian Gaming Commission (the "NIGC") extensive powers of oversight in order to "shield [Indian gaming operations] from organized crime and other corrupting influences." 25 U.S.C. § 2702(2); *see generally* § 2706(b)(3) (authority to "conduct . . . background investigations"); *id.* § 2706(b)(4) (authority to "inspect, examine, photocopy and audit" records); *id.* § 2715(a) (subpoena authority); 25 C.F.R. §§ 571.1-571.14 (NIGC regulations implementing statute). Congress has further provided that the NIGC "shall, when [any information it receives] indicates a violation of Federal, State or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials." 25 U.S.C. § 2716(b).

Moreover, States have bargained for the inclusion of a broad range of regulatory provisions in state-tribal gaming compacts. Of particular relevance here, States have demonstrated the ability to gain liberal access to tribal casinos and to casino records through the compacting process. *See, e.g.*, N.M. Stat. Ann. § 11-13-1 (New Mexico Indian Gaming Compact) (providing that State may inspect public and non-public areas of gaming facilities without prior notice, and that State may copy gaming records and disclose any gaming operation records "as necessary to audit, investigate, prosecute or arbitrate violations of this Compact *or other applicable laws*") (emphasis added).

Against this backdrop, Petitioners' speculation about the potential for lawlessness, predicated as it is on nothing but innuendo, stereotype and hyperbole, rings hollow. The court of appeals' decision does not mark some radical departure from existing law and practice. To the contrary, it conforms to the collaborative approach to law enforcement that prevails throughout much of Indian country, and that, far from creating hundreds of enclaves of lawlessness, has led to an enhancement of both non-tribal and tribal law enforcement capabilities. Tribes presently play a vital role in law enforcement, and many States and Counties place great stock on that role. Petitioners' claims provide no reason for this Court to revisit its well-established doctrines in the areas of tribal sovereign immunity and self-government.

* * * * *

Nearly sixteen years ago, California and numerous *amici* appeared before this Court and argued that the States'

As part of the intensive regulation to which Tribes and the federal government subject Indian gaming operations, the Department of Justice monitors the operations for any signs of encroachment by organized crime, and has repeatedly concluded that no link exists between the two. *See, e.g., Indian Gaming Regulatory Act: Hearings Before the* Senate *Comm. on Indian Affairs*, 107th Cong. at 63 (July 25, 2001) (statement of Bruce G. Ohr, Chief, Dep't of Justice, Organized Crime and Racketeering Section, Crim. Div.) ("The Department has found no evidence of a systematic infiltration of Indian gaming by elements of organized crime"). Numerous academic studies, moreover, have concluded that Indian gaming actually causes a decrease in crime because of the substantial oversight and the greater funds available for law enforcement activity. *See, e.g.*, National Opinion Research Center, University of Chicago *et al.*, *Gambling Impact Behavior Study: Report to the National Gambling Impact Study Commission* 65-70 (1999) (concluding that there is no link between the introduction of casino gaming and overall increases in crime).

interest in effective law enforcement meant that they should be able to regulate Tribes in the conduct of their gaming operations. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987) (noting California's argument that its gambling laws may be applied to "high stakes, *unregulated* bingo, the conduct which attracts organized crime"); *see also* Appellants' Closing Br., at 9-10 (Oct. 20, 1986) (No. 85-1708) (arguing that tribal games "create substantial risks of organized criminal infiltration" and that "unregulated bingo creates substantial organized crime risks, and to argue otherwise ignores the lessons of past experience"); Appellants' Opening Br. 21, 25-29 (Aug. 8, 1986) (No. 85-1708) (same). This Court rejected the argument, *see* 480 U.S. at 221-22, and as events have shown, California's speculation about law enforcement imperatives has proven to be unfounded, *see supra* note 13.

Petitioners and their *amici* appear today before the Court making a virtually identical argument, advancing unsupported claims about the specter of lawlessness, but to an even graver end: state and county regulation of tribal government itself. The outcome should be the same: Petitioners' hyperbole is insufficient to trump long-standing notions of tribal sovereign immunity or to allow for the serious infringement on the Tribes' established right to self-government that Petitioners' position would entail.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

IAN HEATH GERSHENGORN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, DC 20005
(202) 639-6000

RIYAZ A. KANJI
Counsel of Record
KANJI & KATZEN, PLLC
201 South Main Street
Suite 1000
Ann Arbor, MI 48104
(734) 769-5400

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Ave., N.W.
Suite 200
Washington, DC 20036
(202) 466-7767

KAIGHN SMITH, JR.
DRUMMOND WOODSUM & MACMAHON
245 Commercial Street
Portland, ME 04104
(207) 772-1941

Appendix A

Bill Lockyer
Attorney General

State of California
Department of Justice

April 16, 2002

To: ALL CALIFORNIA DISTRICT ATTORNEYS, SHERIFFS AND CHIEFS OF POLICE:

Re: ***Impact of Bishop Paiute v. County of Inyo***

This letter is intended to provide guidance regarding enforcement of California's criminal laws on tribal lands in light of the recent decision of the United States Court of Appeals for the Ninth Circuit in *Bishop Paiute v. County of Inyo* (2002) 275 F.3d 893. Public Law 280 (18 U.S.C. § 1162) grants California jurisdiction over offenses committed by or against Native Americans in Indian country and specifies that the state's criminal laws have the same force and effect on tribal lands as they do elsewhere in the state. In *Bishop Paiute*, the Ninth Circuit found that tribal sovereignty limits criminal law enforcement under Public Law 280, with regard to search warrants seeking to obtain "uniquely tribal property" from a tribe. Specifically, search warrants to obtain tribal casino employment records in the course of a welfare fraud investigation were found to be an improper exercise of Public Law 280 jurisdiction.

Representatives of several law enforcement agencies have expressed concerns over the adverse impact of the *Bishop Paiute* decision on criminal law enforcement on Indian lands in their county and on the possibility of personal civil liability under 42 United States Code section 1983, the federal civil

rights law, if search warrants are served in violation of this case. In *Bishop Paiute*, individual civil liability under section 1983 was imposed. While this concern is understandable, the Attorney General believes the application of this opinion is actually very narrow and compliance easily achieved.

The Attorney General disagrees with the legal reasoning underlying the *Bishop Paiute* opinion, and further appellate review continues. However, even if the opinion becomes final, it is very narrow in application and should have only limited impact on local law enforcement. The following addresses specific law enforcement situations and the impact of the *Bishop Paiute* opinion:

- Authority to Enforce Criminal Laws for Crimes Committed Inside and Outside Indian Country:

  Except as detailed below, the authority granted by Public Law 280 and state law, to enforce state criminal laws against both Indian and non-Indians, for crimes committed inside and outside Indian country, remains unchanged by they *Bishop Paiute* opinion.

- Authority to Arrest or Detain Inside Indian Country:

  The criminal jurisdiction granted by Public Law 280 renders an arrest in Indian country no different from an arrest by a sheriff or police officer anywhere else in the jurisdiction. By virtue of Public Law 280, a reservation boundary is nonexistent for criminal jurisdiction purposes, and this unaffected by the *Bishop Paiute* opinion.

- Authority to Conduct Searches and Seizures Inside Indian Country Which are Directed to an Individual:

  There is no question that a search warrant (or subpoena) may be directed at an individual tribal member. The *Bishop Paiute* opinion specifically acknowledges this point. The search warrant (or subpoena) can be directed to the individual, his personal property or his residence. This analysis also applies to warrantless searches.

- Authority to Conduct Searches and Seizures Inside Indian Country Which are Directed to the Tribe:

  The area affected by *Bishop Paiute* is the service of search warrants (and subpoenas) where the object is to obtain "uniquely tribal property" held by the tribe. This phrase includes business, employment, health and housing records maintained by the tribe. Until the *Bishop Paiute* litigation is resolved, legal process should not be used to obtain such property. Other options for obtaining needed evidence should be explored, including seeking the tribe's cooperation or obtaining the information from other sources.

As stated above, the *Bishop Paiute* case remains in litigation. For this reason, the holding in the case, its application and import to California law enforcement may change. The Ninth Circuit is currently considering a request by Inyo County to reconsider the decision. It is possible the decision may be modified by the Ninth Circuit or changed as a result of an appeal to the Supreme Court of the United States.

If you have questions regarding this issue, please contact the undersigned at (916) 324-5293.

Sincerely,

/s/ Robert R. Anderson
ROBERT R. ANDERSON
Chief Assistant Attorney General

For BILL LOCKYER
Attorney General

Appendix B

ARIZONA ATTORNEY GENERAL
SOLICITOR GENERAL'S OFFICE
INTEROFFICE MEMORANDUM

DATE: May 9, 2002
TO: All Division and Section Chief Counsels
FROM: Patrick Irvine
Solicitor General
CC: *Nevada v. Hicks*, 121 S. Ct. 2304 (2001)

In *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304 (2001), the United States Supreme Court held that Indian tribal courts lack jurisdiction over civil actions brought against non-Indian state officials for tortious conduct occurring on a reservation while in the performance of a state law enforcement function. In *Hicks*, state game and fish officers searched a tribal member's home on the reservation for fruits of a state crime pursuant to a state warrant that had been approved by the tribal court. Language in the opinion and concurring opinions discussing the scope of state jurisdiction over tribal lands has caused concern among tribal governments that federal, state and local law enforcement agencies will read the opinion as giving state agencies broad jurisdiction to enforce state laws in Indian country. This concern is not confined to criminal cases, but could encompass civil summons, property seizure orders, orders relating to child welfare cases, and other official actions of state courts. Specifically, the Court stated:

> We conclude today, in accordance with these prior statements, that tribal authority to regulate state

> officers in executing process related to the violation, off-reservation, of state laws is not essential to tribal self-government or internal relations – to "the right to make laws and be ruled by them." The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government.

121 S. Ct. at 2313. This language should not be read out of context; *Nevada v. Hicks* involved a search warrant that was approved by a tribal judge. Similarly, any service of process or other official action by state officials must be viewed in the context of tribal sovereignty and will certainly involve fact specific questions.

The need for careful analysis is shown by a recent Ninth Circuit case in which a district attorney and county sheriff were found to be liable under Section 1983 for executing a search warrant on a tribe seeking tribal employment records. *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002). The court held the county did not have jurisdiction to execute a search warrant against tribal property. *Bishop Paiute* does not cite *Nevada v. Hicks*, although it was argued and decided after *Hicks* was issued, so it does not directly limit the broad language of the decision. Nevertheless, the Ninth Circuit decision shows that there are risks associated with acting without a full and complete analysis of the law and facts involved in a particular case.

Therefore, it is the position of this Office that *Nevada v. Hicks* should be narrowly read and does not represent an expansion of state jurisdiction. All agencies should continue to cooperate and coordinate law enforcement activities and investigations

with the appropriate tribal law enforcement agency. Where other sate and local law enforcement agencies seek this Office's assistance in investigating and prosecuting crimes connected to a tribal member residing on a reservation, we should advise them to operate in the same manner, coordinating law enforcement activities with the appropriate tribal law enforcement agency. While the scope of state jurisdiction in light of *Nevada v. Hicks* may require further judicial clarification, our primary concern should be to avoid situations that may create dangers for the public and law enforcement personnel.

Arizona tribal governments have been informed of this Office's position. This memo may be shared with state law enforcement agencies.

Appendix C

Law Enforcement Coordinating Committee
District of Arizona
United States Attorney's Office
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
(602) 514-7500
FAX: (602) 514-7585

February 11, 2002

Karl G. Auerbach, Assistant Chief
Salt River Police Department
10005 E. Osborn Road
Scottsdale, AZ 85256

RE: ***Nevada v. Hicks***

Dear Assistant Chief Auerbach:

I'm sure by now you are aware of the recent Supreme Court case, *Nevada v. Hicks*, a decision that has a potential for great impact on existing state, county, and tribal law enforcement relationships in Arizona. As the Chairman of the Law Enforcement Coordinating Committee, I write to encourage continued cooperation between all state, county, tribal and federal law enforcement agencies in the wake of this decision.

This decision has created a fervor of discussion due to the potential negative impact that it has on historic, developing, and existing Arizona state, county, and tribal law enforcement agreements. Statewide meetings involving state, county and

tribal agencies and government representatives have already begun and will continue to take place in the coming months to determine the impact of this decision on existing Arizona state laws, policies and procedures.

Law enforcement in Arizona has a proud history of cooperation and professionalism. While the impact and meaning of the *Nevada v. Hicks* decision is discussed, it is my hope that state, county and federal law enforcement agencies will continue to cooperate and coordinate law enforcement activities and investigations with the appropriate tribal law enforcement agency. To do otherwise, would create public safety concerns and reverse the high standards of professionalism each of our agencies have set.

I am proud to represent the LECC, an organization that has helped to create open dialogue and cooperation in combating crime in Arizona. Working together, we will continue to provide safe living and working environments for all Arizona citizens.

I look forward to seeing you in Prescott this May.

Sincerely yours,

/s/ Paul K. Charlton
Paul K. Charlton
United States Attorney
District of Arizona